Supreme Court, U.S.
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No. 02-1230

IN THE

Supreme Court of the United States

CRAIG LYNN RANG,

Petitioner,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Fifth Circuit employ a "pretext plus" analysis in reviewing the District Court's summary judgment against Petitioner?

2. Whether the Fifth Circuit erred in affirming the District Court's summary judgment against Petitioner.

STATEMENT PURSUANT TO RULE 29.6

The Respondent is Schlumberger Technology Corporation, a wholly owned subsidiary of Schlumberger, Limited, a publicly traded corporation listed on the NYSE by the symbol, "SLB" and also listed on the Paris, London, Amsterdam and Swiss Stock Exchanges.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Summary of the Argument	1
A. The Petitioner Failed To Establish A *Prima Facie* Case	1
B. The Relevant Standard	1
C. The Petitioner Did Not Establish Pretext	1
Statement of the Case	2
Argument	5
A. Rang Did Not Establish A *Prima Facie* Case	5
B. Petitioner Misconstrues This Court's Opinion In *Reeves* And The Fifth Circuit's Opinion In *Vadie*	9
1. The *Reeves* Opinion	10
2. The Fifth Circuit's Opinion In *Vadie*	12

Contents

Page

C. The Fifth Circuit Did Not Apply A "Pretext Plus Analysis" In Reviewing Summary Judgment In This Case. 14

D. Petitioner Did Not Establish Pretext 15

1. Disputing Perceived Performance Does Not Equate To Pretext 15

2. Rang's Evidence Did Not Establish Pretext 18

(a) The Basis For Schlumberger's Motion For Summary Judgment .. 18

(b) Rang's Performance in Prior Years 19

(c) Rang's 1999 Performance Evaluation 19

(d) Rang's Objectives 21

(e) Rang's "Objective Evidence" of His Superior Qualifications 21

3. Schlumberger Presented Abundant Evidence That No Discrimination Occurred 23

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Amburgey v. Corhart Refractories Corp.,
936 F.2d 805 (5th Cir. 1991) 8

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S. Ct. 2505,
91 L. Ed. 2d 202 (1986) 10

Bienkowski v. American Airlines, Inc.,
851 F.2d 1503 (5th Cir. 1988) 16

Bodenheimer v. PPG Industries, Inc.,
5 F.3d 995 (5th Cir. 1993) 6, 7, 9

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S. Ct. 2548,
91 L. Ed. 2d 265 (1986) 14

Dorsey v. Pinnacle Automation Co.,
278 F.3d 830 (8th Cir. 2002) 16

Gonzalez v. El Dia, Inc.,
304 F.3d 63 (1st Cir. 2002) 16

Hazen Paper Co. v. Biggins,
507 U.S. 604, 113 S. Ct. 1701,
123 L. Ed. 2d 338 (1993) 24

Kearney v. Town of Warcham,
316 F.3d 18 (1st Cir. 2002) 16

Cited Authorities

Page

Mathes v. Furniture Brands Int'l., Inc.,
266 F.3d 884 (8th Cir. 2001) 17

Nichols v. Loral Vought Systems Corp.,
81 F.3d 38 (5th Cir. 1996) 7

Perez v. Region 20 Educ. Serv. Ctr.,
307 F.3d 318 (5th Cir. 2002) 16

Peters v. Lincoln Elec. Co.,
285 F.3d 456 (6th Cir. 2002) 17

Price v. Federal Express Corp.,
283 F.3d 715 (5th Cir. 2002) 17

Ransom v. CSC Consulting, Inc.,
217 F.3d 467 (7th Cir. 2000) 16

Reeves v. Sanderson Plumbing Products Inc.,
530 U.S. 133, 120 S. Ct. 2097,
147 L. Ed. 2d 105 (2000) .....*passim*

Rhodes v. Guiberson Oil Tools,
75 F.3d 989 (5th Cir. 1996) 12

Rosado v. Radio Shack,
312 F.3d 532 (1st Cir. 2002) 16

Sandstad v. CB Richard Ellis, Inc.,
309 F.3d 893 (5th Cir. 2002) 16

Cited Authorities

Page

Shackelford v. Deloitte & Touche, LLP,
190 F.3d 398 (5th Cir. 1999) 16

Shannon v. BellSouth Telecommunications, Inc.,
292 F.3d 712 (11th Cir. 2002) 16

Silvera v. Orange County Sch. Bd.,
244 F.3d 1253 (11th Cir. 2001) 17

St. Mary's Honor Center v. Hicks,
509 U.S. 502, 113 S. Ct. 2742,
125 L. Ed. 2d 407 (1993) 10-11

Thornbrough v. Columbus and Greenville Railroad Co.,
760 F.2d 633 (5th Cir. 1985) 6

Traylor v. Brown,
295 F.3d 783 (7th Cir. 2002) 16, 17

Tyler v. RE/MAX Mountain States, Inc.,
232 F.3d 808 (10th Cir. 2000) 16

Vadie v. Mississippi State University,
218 F.3d 365 (5th Cir. 2002) ..... *passim*

Walker v. Prudential Prop. & Casualty Ins. Co.,
286 F.3d 1270 (11th Cir. 2002) 17

Cited Authorities

Page

Williams v. General Motors,
656 F.2d 120 (5th Cir.), *cert denied*, 455 U.S. 943,
102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982) 5, 6

Rule:

Federal Rule of Civil Procedure 50 ..... 10, 16

SUMMARY OF THE ARGUMENT

A. The Petitioner Failed To Establish A *Prima Facie* Case

The Fifth Circuit appropriately found that the Petitioner failed to establish a *prima facie* case. Specifically, the Petitioner failed to offer evidence that he was replaced by someone outside the protected group, or was otherwise discriminated against because of his age.

B. The Relevant Standard

The Petitioner misstates the standard applied by the Fifth Circuit in ruling that the District Court's grant of summary judgment was appropriate. According to the Petitioner, the Fifth Circuit held that evidence of the falsity of each and every reason offered by the Respondent for its adverse employment decision has "no probative value" with respect to the question of whether the Respondent intentionally discriminated against the Petitioner. The Fifth Circuit made no such holding, either in the present case or in *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2002).

C. The Petitioner Did Not Establish Pretext

The Fifth Circuit did not err in holding that Petitioner failed to establish that Respondent's articulated reason for laying him off was a pretext for intentional age discrimination. The Petitioner failed to offer probative evidence that Schlumberger's assessment of Petitioner's performance was false. Petitioner's argument amounted to little more than quibbling over Respondent's assessment of his performance, which is insufficient to establish pretext under existing precedent.

STATEMENT OF THE CASE

Respondent, Schlumberger Technology Corporation (hereafter "Respondent" or "Schlumberger") is an oil well service company based in Houston, Texas. While Schlumberger offers a variety of products and services, the bulk of its work involves "wireline service," which is essentially technology for servicing oil wells and exploring for oil and gas in drilled wells. The Petitioner, Craig Rang (hereafter "Petitioner" or "Rang") began working for Schlumberger in 1974 as a Sales Engineer. Rang's employment as a Sales Engineer, as well as his subsequent positions, generally involved the sale of Schlumberger's wireline products and services. By 1999, Rang held the position of "Sales Development Engineer" with Schlumberger in the "Williston Basin" area that encompassed the states of Montana, North Dakota and the northern halves of South Dakota and Utah.

By 1999, Rang's supervisor was Dwight Peters, the Wireline Sales Manager. Peters became Rang's supervisor in 1998. Prior to Peters becoming Rang's supervisor, Rang had received some satisfactory performance evaluations and some above average evaluations. However, Peters did not assess Rang's performance as highly. Peters gave Rang a "D" rating, which indicated that development was needed in Rang's performance. Despite Rang's attempt to characterize the basis for Peters' low rating of his performance as relating to only one area, there were actually several areas in which Peters felt Rang had underperformed. Among these areas were Rang's overall sales performance, Rang's failure to sell "key services,"[1] and a "lack of initiative" in terms of generating business.

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1. "Key services" consisted of new technology designed to increase production from existing wells.

In 1998, the price of domestic crude oil dropped substantially, and consequently, Schlumberger's overall business declined. As a result of this business decline, Schlumberger instituted a nationwide reduction in force. To facilitate the reduction in force, local management was assigned the task of determining the number of employees necessary to achieve a certain cost reduction and selecting the employees who would be laid off. This task fell to Peters for the employees in his division.

Peters determined that three out of the thirteen employees in his operating division would need to be laid off. To select who would be laid off, Peters conducted a "forced ranking" of the employees in his division, ranking them by their most recent performance appraisals. Rang had the lowest performance appraisal in his group. The three individuals ultimately selected by Peters for layoff were Rang, age 49, Scott Riley, age 36, and Kirk Schmidt, age 30. Scott Riley was laid off in January of 1999 and Schmidt was laid off in February of 1999. Peters allowed Rang to remain on the roll of employees until Rang reached his fiftieth birthday so he could qualify for continuing medical benefits. Rang's last day of employment was in August, 1999. Scott Riley was later offered a job and subsequently hired in another Schlumberger department.

Schlumberger strongly disagrees with two factual representations made by Rang in his Petition. First, Rang claims that Schlumberger replaced him. Second, Rang claims that Schlumberger offered Schmidt another job. No one was hired to replace Rang; his functions were assumed by existing personnel. There is no record evidence of anyone being hired to replace Rang. Moreover, Schmidt was not offered a job by Schlumberger. The record evidence establishes that a

Schlumberger employee with no hiring authority named Joe Poole had a social lunch meeting with Schmidt, and during the meeting, simply asked Schmidt if he would ever have any interest in returning to work at Schlumberger. There was no "job offer" made to Schmidt.

Rang instituted this action in the United States District Court for the Northern District of California on March 29, 2000. Venue of the case was changed on Schlumberger's motion to the United States District Court for the Southern District of Texas. Rang's lawsuit urged causes of action for age discrimination under the ADEA, retaliation under the ADEA, and various causes of action under Montana state law. Following substantial discovery, which included Rang taking three depositions, including the deposition of Dwight Peters, and receiving over eight hundred pages of documents, Schlumberger filed a motion for summary judgment as to all of Rang's claims. In response to Schlumberger's motion for summary judgment, Rang urged that a triable issue of fact existed with regard to the ADEA claim because he had established that Schlumberger's articulated reason for the "D" rating on his performance evaluation, and thus his subsequent selection for layoff, was a pretext for age discrimination. The District Court granted summary judgment in favor Schlumberger on November 5, 2001.

Rang appealed the District Court's summary judgment to the Fifth Circuit Court of Appeals. On October 21, 2002, a panel of the Fifth Circuit Court of Appeals issued a *per curiam* opinion affirming the District Court's ruling, finding that Rang had failed to establish a *prima facie* case, and additionally, finding that Rang had failed to create a triable issue of fact with regard to his age discrimination claim. Thereafter, Rang submitted his Petition for Writ of Certiorari to this Court.

ARGUMENT

A. Rang Did Not Establish A *Prima Facie* Case

The Fifth Circuit held that summary judgment in favor of Schlumberger was correct because Rang had failed to establish his *prima facie* case. Specifically, the Fifth Circuit held that to establish this *prima facie* case, Rang must prove: (1) that he was discharged; (2) that he was qualified for his position; (3) that he was within a protected class; and (4) that he was (a) replaced by someone outside the protected class, or (b) replaced by someone substantially younger, or otherwise discharged because of his age. (*See* Pet'r. App. at A2).

While there is no evidence that Rang was replaced by someone outside the protected class, there is evidence that younger employees were retained in "similar" positions by Schlumberger. The Fifth Circuit, however, found that no *prima facie* case existed because there was no probative evidence to support an inference that age was a determining factor in the selection of Rang for layoff. A review of the cases cited by Rang, as well as the more recent Fifth Circuit authority on the subject, establishes that the Fifth Circuit's rationale in finding that Rang had failed to establish a *prima facie* case is sound.

In *Williams v. General Motors*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982), the Fifth Circuit modified the *McDonnell Douglas* burden shifting analysis in the context of reduction in force cases. The Fifth Circuit held that the *prima facie* case could be satisfied by a plaintiff establishing: (1) that he was within a protected group; (2) that he had been adversely

affected; (3) that he was qualified to assume another position at the time of the layoff; and (4) by the production of evidence "circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Williams*, 656 F.2d at 129. Effectively, the *Williams* court allowed a plaintiff to establish a *prima facie* case through circumstantial evidence that younger employees were treated more favorably. This could be accomplished by evidence leading to the conclusion that the defendant consciously refused to consider retaining or relocating an employee because of his age or that the defendant regarded age as a negative factor. *Williams* at 129-30.

The *Williams* decision was stretched "to its limit" by *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633 (5th Cir. 1985), where the Fifth Circuit allowed an employee to establish a *prima facie* case by proving that he had been laid off while younger, less qualified employees were hired immediately following the plaintiff's layoff.

The Petitioner fails to bring to the Court's attention the more recent cases addressing the plaintiff's *prima facie* case in a reduction in force context. Two important opinions have been issued by the Fifth Circuit subsequent to *Williams* and *Thornbrough*. In *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 995 (5th Cir. 1993), the Fifth Circuit found that an ADEA plaintiff failed to establish a *prima facie* case where he submitted an affidavit wherein he opined that he was better qualified than a younger employee who was retained. *Id.* at 959. The *Bodenheimer* court held that such evidence does not establish the *prima facie* case unless the evidence establishes that the plaintiff was "clearly better qualified" than the employee retained. *Id.* Moreover, Bodenheimer

offered the affidavits of two customers, similar to the Petitioner's evidence in the present case, who opined that the plaintiff provided better quality service than did the retained employee. *Id.* The Fifth Circuit found this evidence unpersuasive as well. *Id.*

In *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38 (5th Cir. 1996), the Fifth Circuit again addressed the *prima facie* case in a reduction in force environment. The plaintiff in *Nichols* was laid off while three less experienced employees were retained in similar positions at the same location. *Id.* at 42. Nichols argued that his greater experience in the same positions as those held by the younger, less experienced, retained employees established that he was clearly better qualified. *Id.* The Fifth Circuit again found that this argument lacked merit. *Id.* The court held that the plaintiff's equating years served with superior qualifications was erroneous, as the court in *Bodenheimer* held that greater experience alone will not suffice to raise a fact issue. *Id.*

A review of *Bodenheimer* and *Nichols* in relation to the present case establishes that the quality of evidence offered to support the *prima facie* case by the Petitioner is no more persuasive than that offered by the plaintiffs is those cases. To fend off summary judgment, Rang offered nothing more than his own subjective assessment of his qualifications, conclusory affidavits from a few Schlumberger customers and one former manager who thought Rang did good work, and an argument that his years of experience and tenure in the jobs held by retained employees made his "superior qualifications" beyond doubt. Despite this, Rang failed to prove through specific evidence that he was "clearly better qualified" than the younger employees retained by Schlumberger. This is established by the very fact that Peters had ranked Rang's performance the lowest of the thirteen employees in his group. Thus, Rang is left with his

remaining contention that he was "qualified" to fill the other jobs in which the younger employees were retained simply because he had held them before. Rang offered little more than the length of his service and positions he held to support his claim of superior qualification. Peters' ranking was not based upon experience, but upon current performance. Absent establishing that each and every stated reason by Peters for ranking Rang with a "D" was a pretext, Rang's argument must fail.

Rang relies heavily on the Fifth Circuit's opinion in *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805 (5th Cir. 1991), for the argument that Schlumberger's retaining younger employees working in similar positions to Rang is sufficient to establish the *prima facie* case. Ironically, the very case Rang relies upon actually harms his position. In *Amburgey*, the plaintiff was laid off while arguably less qualified employees with less seniority were allowed to transfer following the plant closing and reduction in force that resulted in Amburgey's loss of employment. *Amburgey*, 936 F.2d at 807. Amburgey was clearly qualified for three of six jobs allegedly filled by less senior and younger employees. *Id.* However, the distinction between *Amburgey* and the present case is that there were no material facts at issue with regard to Amburgey's qualifications. *Id.* at 812. In the present case, Rang had been rated as a lower performer than the less senior and younger employees who were retained by Schlumberger. While Rang may dispute the accuracy of Peters' assessment of his performance, the fact still remains that Peters had deemed Rang less qualified, and thus, Rang was more likely to be laid off.[2]

2. Rang ignores the fact that he *was* treated the same as employees outside his protected age group: both Riley and Schmidt were under forty, had higher performance ratings than Rang, and were also laid off in the same process. Additionally, two employees over forty in Peters' group were not laid off.

The Fifth Circuit's holding that Rang failed to establish a *prima facie* case is a result of the quality of his evidence as a whole. Instead of offering specific comparative evidence regarding his qualifications in relation to other retained employees, Rang focused on establishing that Peters' assessment of his performance was unfair or inaccurate.[3] Having failed to sufficiently establish that he was in fact clearly better qualified at the time of the layoff decision than the employees who were retained, the Fifth Circuit's opinion was correct.

Rang failed to establish a *prima facie* case of discrimination under the ADEA. Therefore, the Fifth Circuit correctly affirmed the District Court's summary judgment against Rang.

B. Petitioner Misconstrues This Court's Opinion In *Reeves* And The Fifth Circuit's Opinion In *Vadie*

The Petitioner argues that the Fifth Circuit, in *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2002), disregards this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). A review of this Court's opinion in *Reeves*, and the Fifth Circuit's *Vadie* opinion, reveals that the Petitioner has misinterpreted both cases.

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3. As noted in *Bodenheimer*, the plaintiff should offer specific evidence comparing his ability to perform the job superior to that of the retained employee. *Id.* at 959. Rang did not do this.

1. The *Reeves* Opinion

In *Reeves*, this Court granted certiorari to decide whether a verdict favorable for a plaintiff in an age discrimination claim was properly reversed by the Fifth Circuit Court of Appeals.[4] In *Reeves*, the employer offered several grounds for its termination decision, each of which was disproven by Reeves during trial. Additionally, Reeves offered substantial and compelling evidence of age-related animus by his employer, manifested in statements by his supervisor of a highly discriminatory nature. The jury returned a verdict in Reeves' favor. However, despite Reeves' successful contradiction of each of the employer's proffered nondiscriminatory reasons, and in disregard of the substantial evidence of age-related animus, the Fifth Circuit reversed the jury's verdict.

In reversing the opinion of the Fifth Circuit, this Court held that a fact finder's rejection of a defendant's proffered reason will permit an inference of the ultimate fact of intentional discrimination, citing the Court's opinion in *St. Mary's Honor*

4. The *Reeves* opinion was related to the review of a judgment as a matter of law following an adverse jury verdict under Federal Rule of Civil Procedure 50. While the standard for reviewing a court's grant of summary judgment is the same as a judgment under Rule 50 (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)), it is important to note the context in which the rulings have occurred. The plaintiff in *Reeves* provided sufficient evidence to get to a jury, which then found in his favor, before the Fifth Circuit reversed despite substantial evidence of discrimination. In the present case, the District Court granted summary judgment, and the Fifth Circuit affirmed, after the Petitioner did nothing more than argue that he thought he did a better job than was reflected in his supervisor's assessment of his work. Rang's purported evidence of pretext was nowhere near the quantum or quality of the plaintiff's evidence in *Reeves*.

Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). However, this Court also held:

> This is not to say that such a showing by the Plaintiff will always be adequate to sustain a jury's finding of liability. **Certainly there will be instances where, although the Plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the Defendant's explanation, no rational fact finder could conclude that the action was discriminatory.** For instance, an employer would be entitled to judgment as a matter of law if the record conclusively reveals some other, non-discriminatory reasons for the employer's decision, or if the Plaintiff created only a weak issue of fact as to whether the employer's reason was untrue, and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 120 S. Ct. at 2109 (emphasis added).

Obviously, this Court's opinion in *Reeves* did not provide, as the Petitioner asserts, that a judgment in favor of the defendant is *never* appropriate where the plaintiff has questioned the legitimacy or wisdom of the defendant's proffered non-discriminatory reason. Such a ruling would establish the dangerous policy, specifically noted and rejected by this Court in *Reeves*, that a triable fact issue exists in every case where the plaintiff disagrees with his employer's assessment of his work; this approach would "insulate an entire category of employment discrimination cases from review under Federal Rule of Civil Procedure 50 . . ." *Id.* The Court reiterated that trial courts "should not treat

discrimination differently from other ultimate questions of fact." *Id.*

2. The Fifth Circuit's Opinion In *Vadie*

The Fifth Circuit issued its opinion in *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2000), about one month after this Court's opinion was issued in *Reeves*.[5] The *Vadie* opinion, like *Reeves*, was the Fifth Circuit's review of a jury verdict, rather than the review of a summary judgment. Vadie complained of national origin discrimination and retaliation. The jury returned a verdict in favor of Vadie on both counts. However, Vadie's evidence of national origin discrimination largely consisted of his disagreement with the defendant's assessment that Vadie was less qualified for a tenured professorship than was the individual ultimately selected. Essentially, Vadie simply argued that the University's decision was wrong, and thus, must have been the result of national origin discrimination and retaliation. Vadie offered no evidence of discriminatory animus otherwise. In reversing the jury's verdict on national origin discrimination, the Fifth Circuit reasoned:

> Viewing the evidence as a whole, as we must, there is nothing probative anywhere in the record of the

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5. While the Petitioner asserts that the Fifth Circuit "disregards" the *Reeves* opinion, a review of *Vadie* reveals that the Fifth Circuit carefully considered *Reeves* in its opinion. The Fifth Circuit noted that this Court's rationale in *Reeves* was consistent with its *en banc* opinion in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), wherein the Fifth Circuit held that the plaintiff's *prima facie* case in tandem with evidence allowing rejection of each of the employer's proffered reasons will usually permit a finding of discrimination. *Vadie*, 218 F.3d at 382 n.23.

> ultimate question of national origin discrimination. Dr. Vadie argued that Dr. Zappi, who had no teaching experience, was not qualified for the 1995 position and was certainly no match for Dr. Vadie's own record of success in research and teaching. He further asserted that when MSU advertised for the 1993 position a Ph.D. in Chemical Engineering was not required and that the addition of such a requirement for the 1995 position was pretextual . . . the evidence has no probative value with respect to the ultimate question before the jury of whether there was discrimination based on national origin . . . there is no evidence in the record that the Defendant ever adversely considered national origin with respect to any of its faculty.

Vadie, 218 F.3d at 373.

In the present case, the Petitioner's characterization of the Fifth Circuit's opinion in *Vadie* is wrong. The Petitioner argues that the Fifth Circuit held that a plaintiff's establishing the falsity of each and every reason offered by a defendant for the adverse employment action has no probative value with respect to the ultimate question of whether the defendant intentionally discriminated against the plaintiff. (Pet'r. Br. at p. 10). However, a reading of *Vadie* establishes that the Fifth Circuit held that Vadie's quibbling over the University's assessment of his qualifications in relation to the professor ultimately chosen offered no probative value. As in the Petitioner's case, Vadie offered no other evidence of any probative value, such as discriminatory remarks, to support his case: he simply argued over the wisdom of the defendant's employment decision. The Fifth Circuit correctly found no merit in such an approach.

C. The Fifth Circuit Did Not Apply A "Pretext Plus Analysis" In Reviewing Summary Judgment In This Case.

In his Petition, Rang asserts that the Fifth Circuit applied a "pretext plus" analysis in reviewing the District Court's summary judgment against him. However, a review of the Fifth Circuit's opinion reveals that no such analysis was employed.

The District Court did not issue a memorandum opinion supporting its summary judgment against Rang. Therefore, the Fifth Circuit had to review and consider each of the grounds advanced by Schlumberger in support of its motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Fifth Circuit first correctly noted that Rang failed to establish a *prima facie* case since Rang limited his argument to asserting that Schlumberger's assessment of his performance was incorrect. However, the Fifth Circuit went further to analyze whether Rang had submitted sufficient evidence to establish that Schlumberger's proffered non-discriminatory reason was a mere pretext for discrimination. The appellate court correctly found that Rang was unable to establish pretext merely by disputing Peters' assessment of his work performance. The Fifth Circuit specifically noted that Rang had failed to create a fact issue as to whether each of Peters' stated reasons was what actually motivated Schlumberger to select him for layoff, and found that Rang's evidence did not create a reasonable inference that age was a determinative factor in the layoff decision affecting him.

It is important to note that nowhere in the Fifth Circuit's opinion does it hold that Rang had established a case of

pretext, but then required Rang to produce further evidence of discriminatory animus to defeat Schlumberger's summary judgment evidence. On the face of the Fifth Circuit's *per curiam* opinion, it is obvious that the court never went that far, because it never found that Rang established a *prima facie* case or pretext in the first instance. Simply put, there is no pretext plus analysis in the Fifth Circuit's opinion, and Rang has simply phrased his brief to create the image of such an analysis in order to justify *Certiorari* being granted in this case. However, granting *Certiorari* in this case is not appropriate, as this case presents no issue worthy of Supreme Court review.

D. Petitioner Did Not Establish Pretext

In the Petitioner's Brief, he dedicates approximately nine pages of text toward his assertion that he established Schlumberger's proffered explanation for selecting him for layoff was a pretext for intentional age discrimination. When the facts in the record are considered in light of the relevant law, Petitioner's argument clearly is without merit.

1. Disputing Perceived Performance Does Not Equate To Pretext

Rang seeks to have the opinions of the District Court and Fifth Circuit reversed simply by attacking Peters' assessment of his performance, and not by showing any true pretext or connection between the actions about which he claims and the discrimination he alleges. This is not in accord with this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). As set forth above, the *Reeves* opinion recognized there will be instances where no rational factfinder could

conclude that the action was discriminatory even though a plaintiff established pretext. *Id.* at 148. Further, the Court was careful to note that it was not, by its opinion, insulating an entire category of cases from the application of Rule 50. The federal courts have uniformly held that the civil justice system should not act as a vehicle for second guessing employment decisions, however erroneous those decisions may be. *Kearney v. Town of Warcham*, 316 F.3d 18, 25 (1st Cir. 2002); *Gonzalez v. El Dia, Inc.*, 304 F.3d 63, 69 (1st Cir. 2002); *Traylor v. Brown*, 295 F.3d 783, 790 (7th Cir. 2002); *Shannon v. BellSouth Telecommunications, Inc.*, 292 F.3d 712, 716 (11th Cir. 2002); *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 837 (8th Cir. 2002); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 813-14 (10th Cir. 2000); *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988). "Merely disagreeing with an employer's negative performance assessment is insufficient to show pretext." *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002), *citing Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 408 (5th Cir. 1999).

Several circuits have applied the reasoning of the *Reeves* opinion, and found that summary judgments in employment cases may be appropriate where, as here, a plaintiff attempts to meet his burden of proof by merely quibbling over the wisdom of the adverse employment action at issue. *See e.g.*, *Rosado v. Radio Shack*, 312 F.3d 532, 535 (1st Cir. 2002) (discounting plaintiff's "step-by-step refutation" of defendant's actions and observing that anti-discrimination laws do "not ensure against inaccuracy by an employer, only against . . . discrimination"); *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002) (holding

plaintiff had not provided sufficient proof of age discrimination such that a reasonable juror could make that inference); *Traylor v. Brown*, 295 F.3d 783, 791 (7th Cir. 2002) (refusing to automatically discredit company witnesses to the benefit of the plaintiff in order to reverse summary judgment, since "to so hold would essentially prevent any employer from prevailing at the summary judgment stage"); *Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 1279 (11th Cir. 2002) (observing that a mere "shred of evidence, without more, is insufficient to establish" pretext); *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 471-74 (6th Cir. 2002) (holding that affidavits presented by coworkers in support of the plaintiff's management style did not refute the articulated legitimate business reason for the employer's actions); *Price v. Federal Express Corp.*, 283 F.3d 715, 724-25 (5th Cir. 2002) (finding that the plaintiff failed to make a sufficient showing which would provide for a reasonable inference of discrimination); *Mathes v. Furniture Brands International, Inc.*, 266 F.3d 884, 888-89 (8th Cir. 2001) (holding that the plaintiff failed to provide sufficient, probative evidence which would allow a fact finder to rule in her favor, and instead set forth only "mere speculation"); *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1262 (11th Cir. 2001) (holding that "discrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent").

The cases cited above represent the widespread application of this Court's holding in *Reeves*, and well illustrate the situations in which a plaintiff cannot meet his burden by simply disagreeing with the company's decisions and subjectively opining that he is a better employee than is reflected by his employer's assessment.

2. Rang's Evidence Did Not Establish Pretext

(a) The Basis For Schlumberger's Motion For Summary Judgment

As stated above, Peters evaluated Rang's performance as needing development and was the decisionmaker with regard to Rang's layoff. Peters was deposed and questioned at length regarding his basis for giving Rang a "D" rating. During the approximately 80 pages of testimony on this point, Peters identified several reasons why he felt Rang's performance was in need of development. Peters testified that Rang had missed several sales and marketing figures from the objectives issued to him. Peters also indicated that he felt, based on his meetings with Rang, that Rang was not visiting all of his clients often enough to do his marketing. Moreover, Peters felt that Rang was not taking an active enough role in publishing and presenting papers to customers. All of these failings were generally categorized by Peters as a lack of initiative. Essentially, Peters felt that, during a time of shrinking revenues, he expected Rang to go above and beyond the effort he had previously devoted to his job to maintain or increase revenues.

The steps Peters followed to evaluate Rang, and ultimately make his selection for layoff, were provided to the District Court by Schlumberger in support of its motion for summary judgment. Rang responded to Schlumberger's motion with an avalanche of paperwork, over one thousand pages in fact, which nevertheless largely missed the point. While a detailed discussion of Rang's pretext "evidence" would surely surpass the page limits of this brief, the main categories presented by Rang are discussed below.

(b) Rang's Performance in Prior Years

Rang argued that he was rated a "satisfactory or better" employee during the years 1991 to 1998. This is irrelevant, however, because Peters testified that he only considered the 1999 performance evaluation in conducting his forced ranking. Rang presented no evidence that this was false. He simply argued that the prior performance *should have* been considered.

(c) Rang's 1999 Performance Evaluation

Rang's next argument was that Peters simply got it wrong when he gave Rang a "D" rating for his performance in 1998.[6] Here, Rang offered a ridiculous amount of "evidence," most of which was either irrelevant or simply conclusory, to advance the argument that Peters poor assessment of his work was unfounded.

To advance a pretext argument, Rang attempted to distill Peters' assessment of his performance, and hence his poor evaluation, as resting upon one statement by Peters regarding Rang's "total lack of initiative to do anything about it or get out and seek customers."

Rang devotes substantial discussion to his attempt to rebut Peters' assertion that he was not "getting out and seeing clients." This is not, in fact, what Peters asserted during his deposition. Peters testified that based on some of his meetings with customers that he attended with Rang, along with Rang's poor sales figures, Peters concluded that Rang was not getting

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6. The "1999 Performance Evaluation" addressed Rang's work performance for the year 1998.

out and seeing all of the customers often enough. Peters testified that some of the customers made statements during his visits with Rang indicating that they had not seen Rang in some time. In response, Rang argued that he actually drove more miles in 1999 than he did in previous years. He also provided affidavits from ten customers who stated that Rang did see them regularly. Nevertheless, this "evidence" is not persuasive. Rang had more than ten customers, and he certainly could drive a great number of miles and still choose to see some customers but not others. The fact that Peters believed, whether subjectively or not, that Rang was not seeing customers often enough and was not doing enough to sell services was not established as a pretext by Rang. Finally, Rang argued that: "Peters' statement is simply not credible. Such a serious offense by Rang whose sole responsibility was to call on clients and sell Schlumberger services would not have been permitted to continue for a full year . . ." This assertion is nothing more than Rang's conclusory argument that Schlumberger "should have known better." Such an assertion assumes that prior to Peters' joint sales meetings with Rang, Peters somehow would have known that Rang was not meeting with clients often enough. Again, it is simply an argumentative statement that does not establish pretext.

Peters also testified that he felt Rang lacked creativity and initiative in his sales efforts. Peters based this belief upon the fact that Rang had failed to maintain or increase all of his sales numbers objectives during a year of declining business. To "rebut" this assertion, Rang advanced several arguments. First, he repeatedly and tiresomely referenced a "Wildcatter Award" he received prior to his layoff.[7]

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7. A Wildcatter Award is given to an employee who finds new ways to help a client using Schlumberger technology.

This award reflected performance two years prior to the assessment period at issue, and thus, was simply not relevant. Second, Rang offered statements by ten customers who saw Rang regularly and thought he did show initiative. If Rang had only ten customers, this might have been useful. However, since Rang had up to forty customers he could call on in the Williston Basin area, ten affidavits is simply not substantial.

(d) Rang's Objectives

Rang asserts that he did not receive his performance objectives until late in the year, whereas other younger employees received them earlier. (Pet'r. Br., pp. 6, 8). This is a misrepresentation of the record evidence. Peters testified that he verbally provided all of the Sales Engineers with their objectives at a sales meeting earlier in the year. The objectives were e-mailed to all employees, including Rang, later in the year by Peters. No younger employees were given the objectives any earlier than they were received by Rang. Kirk Schmidt, who was under age forty, also complained about receiving his written objectives late in the year.

(e) Rang's "Objective Evidence" of His Superior Qualifications

Rang attempted to establish his superior qualifications with the affidavit of Gary Riley, a former Schlumberger supervisor who retired in 1998. Riley had not evaluated Rang's performance since 1991. While Riley went to great lengths to establish his knowledge of the "inner workings of Schlumberger," the fact remained that he had no personal knowledge of Rang's performance in 1998. Hence, Riley's

affidavit consisted of nothing more than conclusory statements such as "[T]here is a culture of age discrimination within Schlumberger . . ." and opinions that he would have rated Rang differently given the oil economy at that time. The truth remains, however, that Riley did not know how Rang performed in 1998 any more than he knew how the other employees under Peters' supervision performed. Riley's only basis for his opinion was listening to Rang and reading Peters' deposition. Riley's conclusory and hollow affidavit was nothing more than "arm chair quarterbacking" and was thus properly disregarded by the District Court.

In summary, Rang's evidence of pretext essentially consisted of his subjective belief that Peters had inaccurately assessed his performance and that he was better qualified than the employees retained by Schlumberger. In addition to this "pretext" evidence, Rang offered no other evidence that his age was a factor in any type of decision affecting him at Schlumberger. While it may be argued that Peters' assessment may be unfair, in light of a slow oil drilling economy, or whether it was conclusory because Peters did not consider prior years performance, or whether Peters' assessment was simply "misguided," Rang offered no probative evidence establishing that it was a "false reason" in the mind of Peters. Simply put, Rang disagrees with Peters' assessment of his work and wishes to have the Court second guess it. As set forth above, the court system is not designed to act as a super personnel department and second guess employment decisions, however erroneous they may appear to be. Since there was a complete absence of any meaningful evidence of age discrimination, the District Court properly dismissed Rang's age discrimination claim.

3. Schlumberger Presented Abundant Evidence That No Discrimination Occurred

Not only did Rang wholly fail to establish pretext, the evidence in the record makes clear that age was *not* a factor in Schlumberger's decision. In *Reeves*, this Court noted that abundant and uncontroverted independent evidence that no discrimination occurred would support a district court's dismissal. *Reeves*, 120 S. Ct. at 2109. The record before the District Court in the present case contains an abundance of such evidence.

As set forth above, two of the three employees selected by Peters for layoff were under forty. In addition, two of the employees retained by Peters were over forty. The Schlumberger employee who took over Rang's duties was over forty. Furthermore, Rang cannot connect any of the performance criticisms discussed above and cited by Peters to his age, nor does he present any evidence of age-related animus or age-biased comments by a decisionmaker. Most importantly, Rang himself admitted in his deposition that he did not sell the "key services" set forth in his objectives for 1998, nor did he increase total revenue as expected in his objectives. He further admitted he did not present a technology related paper or symposium to prospective customers as requested by Peters during 1998. While he offers several excuses for why these were not accomplished, he freely admits he did, in fact, fail to meet these objectives. Finally, Peters himself was over forty at the time of Rang's layoff, as were Peters' two superiors who approved the decision to lay off Rang. Accordingly, there is considerable evidence counter to Rang's claim demonstrating that age was in no way a factor in Schlumberger's actions taken toward Rang. This is exactly the type of "abundant and uncontroverted independent evidence that no discrimination occurred" referenced by this Court in *Reeves*. *Id.*

CONCLUSION

In an attempt to have this Court second guess Schlumberger's decision that he was a suitable candidate for layoff, Rang has misrepresented this Court's ruling in *Reeves* as well as the Fifth Circuit's opinion in *Vadie*. Moreover, he misrepresented the record evidence in an attempt to create the appearance of objective factual disputes. When reduced to its essence, Rang's argument is not one criticizing age discrimination by Schlumberger. Rather, it criticizes Schlumberger's refusal to provide preferential treatment to him because of his years of service.[8]

The District Court, and the Fifth Circuit, did not employ a "pretext plus" standard in reviewing Rang's claims. Rang's ADEA claim was properly dismissed by the district court because he failed to offer any meaningful evidence that the true reason for his discharge was age discrimination. Rang's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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8. This Court specifically declined to equate years of service with age, and impliedly declined to give preferential treatment for older workers in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).